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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 8[redacted]106

SHIPPERS PRE-COOLING SERVICE,
Petitioner,

vs.

OFFIE L. MACKS.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

and

BRIEF IN SUPPORT THEREOF.

F. W. DAVIES,
Counsel for Petitioner.

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SHIPPERS PRE-COOLING SERVICE,
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vs.

OFFIE L. MACKS.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

To the Honorable Fred Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner herein prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on March 28, 1950, which was clarified on petition for rehearing on April 28, 1950.

The opinion of the Court of Appeals will be found at pages 331-337 and 341 of the record.[1]

1 References to the "record" in this Petition and in the brief annexed hereto are to pages of the record printed for the use of the Court of Appeals, as supplemented to show the proceedings and opinion there.

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

Appellee, a conductor on the Frisco Railroad, brought suit against petitioner in the Circuit Court of Jefferson County, Alabama, for personal injuries which he received in an accident which happened at Atmore, Escambia County, Alabama. Plaintiff's complaint was based upon the alleged negligence and wilful or wanton conduct of petitioner in so operating an automobile truck that it was driven and stopped and parked in such close proximity to the railroad track that, as the railroad car on which plaintiff was riding reached the point where said truck was stopped, his body was squeezed between said railroad car and truck of petitioner.

At the time of the accident Macks was in charge of a freight train engaged in switching operations. Macks requested the agent of petitioner to disconnect his pre-cooling apparatus which was mounted on a truck, from a freight car to be moved in interstate commerce on which petitioner's agent was then working, so that the switching operations could be completed. It was agreed that said car would be respotted further down the track to a spot more suitable for the refrigeration of the car, and where the ground was firmer and more even with the track. Petitioner's agent did disconnect the pre-cooling apparatus and did pull the truck away from the track. While Macks was engaged in said switching operations, petitioner's agent undertook to relocate the pre-cooling trucks and to prepare to begin the pre-cooling operations when the car was respotted, and, in doing so, became bogged down because of the boggy and unsafe condition of the right of way of the Frisco Railroad, near where the work was being done. The truck, after it bogged down, was close to the track and Macks, in respotting the car was riding on the side of the train, and did not observe the presence of the

truck in time, and his body struck the truck, and, as a result, he received his personal injuries.

Service of process was had upon the Secretary of State of Alabama under the provision of Code of Alabama, Title 7, Section 193, 1947 Supp. Appendix A. Petitioner filed a motion to quash service on the ground, among others, that:

1. At the time of the institution of the suit, and at the time of the service of process, petitioner was a foreign corporation and not qualified to do business in Alabama, and at said time was not engaged in doing any business in Alabama; and

2. At the time of the accident petitioner was engaged solely in interstate commerce, and was engaged in pre-cooling a railroad freight car to be moved in interstate commerce, and the statute did not authorize service on petitioner. It only applied where a foreign corporation was doing business in Alabama in violation of its law. This motion was overruled as a matter of law (R. 14, 17, 19).

3. Petitioner also filed a plea in abatement on the theory that the venue of the action was improper. This plea was held insufficient as a matter of law by the court (R. 24).

Petitioner filed a third-party complaint against the Frisco Railroad. The motion to make the Frisco Railroad a party was granted by the trial court (R. 18). This third-party complaint against the Frisco Railroad was based upon the proposition, in substance, that petitioner's truck became bogged down, and the accident happened as a proximate consequence of the unsafe condition of the right-of-way of the Frisco Railroad, and that plaintiff received his personal injuries as a proximate consequence of the negligence of said Frisco Railroad in failing to maintain

its premises, on which petitioner was an invitee, in a reasonably safe condition, and also that an employee of the Frisco Railroad was negligent in instructing petitioner's agent to move said truck to a place on the right-of-way which was not reasonably safe; and also that the accident was the proximate consequence of the negligence of the Frisco Railroad in negligently operating the train at an unreasonable and improper speed. The cause of action in the third-party complaint was based on the same occurrences or transactions upon which the original cause was based. The trial of the issues on the third-party complaint will involve substantially the same evidence and witnesses as were involved in the trial of the main case.

The District Court, pursuant to Rule 42 b, ordered a separate trial of the issues made by the complaint and answer and those raised by the third-party complaint (R. 23). At the conclusion of the trial of the issues on the complaint and answer the District Court, following Rule 54 b, ordered that there was no just cause for delay in entry of the final judgment upon the verdict rendered by the trial of the issues made by the complaint and answer, and ordered the Clerk to enter a final judgment against petitioner (R. 314), before the trial of the issues made by the third-party complaint.

JURISDICTION.

The jurisdiction of the court in this cause is based upon Title 28, U. S. C. A., Sec. 1254, 62 Stat. 928 (Appendix B hereto). The jurisdiction of the United States District Court was based upon Title 28, U. S. C. A., Sec. 1441 (a), 62 Stat. 937 (Appendix C hereto).

QUESTIONS PRESENTED.

1. Is service of process upon a foreign corporation, under the provisions of Code of Alabama 1940, Title 7, Sec. 193, 1947 Supp. (Appendix A hereto) valid under the 14th Amendment to the Constitution of the United States when it has never qualified to do business in the State, and is not carrying on business there at the time of the attempted service?

2. Is service of process, under the provisions of Code of Alabama 1940, Title 7, Sec. 193, 1947 Supp., valid when said corporation was not engaged in doing intrastate business, but was only engaged in interstate business at the time the cause of action arose?

3. Is the Code of Alabama 1940, Title 7, Sec. 133, 1947 Supp., valid under the 14th Amendment to the Constitution of the United States, when it is so construed as to authorize service of process on a foreign corporation which had never qualified to do any business, and is not doing any kind of business in the state at the time of the commencement of the suit and of the attempted service of process, in a suit based upon a cause of action which arose in the state while the corporation was engaged in interstate commerce?

4. Is venue of an action proper in Jefferson County, Alabama, on a cause of action which arose in Escambia County, Alabama, and when the defendant, which was a foreign corporation not qualified to do business in Alabama, had never done or transacted any business in Jefferson County, Alabama?

5. Is it error to order a separate trial of the issues made by the complaint and answer and the third-party complaint, and to enter a separate judgment on the issues made by

the complaint and answer when the issues on both the complaint and answer and the third-party complaint involve the same occurrences or transactions and substantially the same set of facts, and do not involve issues which are "entirely distinct"?

6. Was the judgment against petitioner a final judgment from which an appeal could be taken, under Rule 54 b?

7. Is it discretionary with the District Court to order a separate trial of the issues made by the complaint and answer and the third-party complaint when they both involve the same occurrences or transactions and are not "entirely distinct"?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

This Court should review the decision below because it is probably in conflict with applicable decisions of this Court. The principles involved have been clearly established by this Court in decisions with which the decision below is in sharp conflict.

II.

This Court should review the decision below because it is in conflict with decisions of other Courts of Appeal on the same question.

III.

This Court should review the decision below because it has decided an important question of local law in a way probably in conflict with applicable local decisions.

IV.

The Court of Appeals has decided an important question of Federal law which has not been, but should be settled by this Court.

* * * * * * *

Wherefore, your petitioner prays that a Writ of Certiorari may be issued out of and under seal of this Court, directed to the United States Court of Appeals for the Fifth Circuit, to the end that the judgment of said Court in this cause may be reviewed by this Court.

SHIPPERS PRE-COOLING SERVICE,

By .....

F. W. DAVIES,

Counsel for Petitioner.



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No. .....

SHIPPERS PRE-COOLING SERVICE,
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vs.

OFFIE L. MACKS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS BELOW.

The opinion of the Court of Appeals, review of which is sought by the Petition herein, is found at pages 331-337 and page 341 of the Record.

JURISDICTION.

The jurisdiction of this Court is based upon Title 28, U. S. C. A., Sec. 1254, 62 Stat. 928 (Appendix B hereto). The jurisdiction of the District Court is based upon Title 28, U. S. C. A., Sec. 1441 a, 62 Stat. 937, and Sec. 1332, 62 Stat. 930 (Appendix C hereto).

This case also involves the construction of Rules 42 b and 54 b of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE.

This has already been stated in the preceding Petition (pp. 2-4) and is hereby adopted and made a part of this Brief.

SPECIFICATION OF ERRORS.

The Court of Appeals erred in holding that:

(1) Service of process upon petitioner, under Code of Alabama 1940, Title 7, Section 193 (Appendix A hereto), was valid even though petitioner was not engaged in doing any business in Alabama at the time of the service of process, and had never qualified to do business in Alabama.

(2) Service of process upon petitioner, under Code of Alabama 1940, Title 7, Section 193, was valid even though petitioner was engaged solely in interstate commerce and was not transacting or carrying on business within the state at the time the cause of action arose.

(3) The Circuit Court of Jefferson County was the proper venue for the action.

(4) Under Rules 42 b and 54 b, Federal Rules of Civil Procedure, the ordering of a separate trial and judgment in this cause was discretionary with the Trial Court, and its action in this regard was not subject to review.

(5) The Trial Court could:

a. Order a separate trial of the issues made by the complaint and answer and the third-party complaint; and

b. Enter a separate final judgment on the complaint and answer before a trial of the issues on the third-party complaint, even though both sets of issues involve the same transactions or occurrences and do not involve issues which are entirely distinct.

ARGUMENT.

SUMMARY OF ARGUMENT.

POINT A. Service of process upon petitioner was not valid because it was a foreign corporation and had never qualified to do business in Alabama, and it was not engaged in doing any business in Alabama at the time of the commencement of the suit and the service of the process upon it.

POINT B. Service of the process upon petitioner, under Code of Alabama 1940, Title 7, Sec. 193, was not valid because at the time the cause of action arose petitioner was not engaged in transacting or carrying on any business within the State of Alabama within the meaning of said Section, but was engaged wholly in interstate commerce, being engaged at the time in pre-cooling or refrigerating a railroad freight car (preparatory to its shipment in interstate commerce), and said statute does not have any application.

POINT C. The issues involved in the complaint and answer and the third-party complaint involved the same occurrences or transactions and did not involve claims which were entirely distinct. Said claims should have been tried together and not separately, and only one final judgment should have been entered in the cause.

POINT D. Jefferson County, Alabama, was not the proper venue for the action.

POINT A.

It is settled law that in order to hold a foreign corporation which has not qualified to do business in a state, responsible under the processes of the court of that state, the

record must disclose that it was carrying on business there at the time of the attempted service.

In **Consolidated Textile Corp. v. Gregory,** 289 U. S. 85, this Court said:

> "In order to hold a foreign corporation not licensed to do business in a state, responsible under the process of a local court, the record must disclose that it was carrying on business there at the time of attempted service. **International Harvester Co. v. Kentucky,** 234 U. S. 579, 583, 585, 58 L. Ed. 1479, 1481, 1482, 34 S. Ct. 944."

In **Street & Smith Publications, Inc. v. Spikes,** 120 F. 2d 895 (5th Circuit), the Court said:

> "It is settled law that in order to hold a foreign corporation, not licensed to do business in a state, responsible under the process of a court of that state, the record must disclose that it was carrying on business there at the time of the attempted service, in such wise as in effect to be present there. Consolidated Textile Corp. v. Gregory, 289 U. S. 85, 53 S. Ct. 529, 77 L. Ed. 1047; Whitaker v. McFadden Publications, Inc., 70 App. D. C. 165, 105 F. 2d 44; Creager v. P. F. Collier & Son Publishing Co., D. C., 36 F. 2d 783; Jno. A. Dickson Publishing Co. v. Bryan, Tex. Com. App., 5 S. W. 2d 980, 60 A. L. R. 983; Southwest General Electric Co. v. Nunn Electric Co., Tex. Com. App., 283 S. W. 781; Employers Reinsurance Corp. v. Bryant, 299 U. S. 374, 57 S. Ct. 273, 81 L. Ed. 289; Hassler v. Shaw, 271 U. S. 195, 46 S. Ct. 479, 70 L. Ed. 900; Mexican Central Ry. Company v. Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. Ed. 699; General Investment Company v. Lake Shore Co., 260 U. S. 261, 43 S. Ct. 106, 67 L. Ed. 244; Ervin v. Quintanilla, 5 Cir., 99 F. 2d 935."

This is also the rule declared by this Court in **People's Tobacco Co. v. American Tobacco Co.**, 246 U. S. 79. The Court said:

> "Upon the broader question, we agree with the district court that the American Tobacco Company, at the time of the attempted service, was not doing business within the state of Louisiana. The question as to what constitutes the doing of business in such wise as to make the corporation subject to service of process has been frequently discussed in the opinions of this court, and we shall enter upon no amplification of what has been said. Each case depends upon its own facts. The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents, present within the state or district where service is attempted. Philadelphia & R. R. Co. v. McKibbin, 243 U. S. 264, 61 L. Ed. 710, 37 Sup. Ct. Rep. 280; St. Louis Southwestern R. Co. v. Alexander, 227 U. S. 218, 226, 57 L. Ed. 486, 488, 33 Sup. Ct. Rep. 245, Ann. Cas. 1915B, 77."

This was also the holding of this Court in the following cases:

Riverside & Dan River Cotton Mills, Inc. v. Williamson Menefee, 237 U. S. 189;
Employers Reinsurance Corp. v. Bryant, 299 U. S. 374;
General Investment Company v. Lake Shore Co., 260 U. S. 261;
Philadelphia & Reading Ry. Co. v. McKibbin, 243 U. S. 264.

This rule also applied to attempted service of process under statutes similar to the Alabama statute here in-

volved. In **State of Washington etc. v. Superior Court of the State of Washington etc.**, 289 U. S. 361, there was involved the validity of service of process on a foreign corporation which had qualified to do business, and had then withdrawn from the state. The Court, in upholding the service in that case, was careful to point out that this case is distinguished from a case where the corporation had never qualified to do business in the state, and in doing so said:

> "The fact that appellant qualified to do business in the State and complied with the registration statute also distinguishes cases of attempted service on a state official pursuant to a statute with which the defendant corporation had never complied, and where at the time of suit it had removed from the state and was transacting no business there. Old Wayne Mut. Life Assoc. v. McDonough, 204 U. S. 8, 51 L. Ed. 345, 27 S. Ct. 236, supra; Consolidated Flour Mills Co. v. Muegge, 127 Okla. 295, 260 Pac. 745, 278 U. S. 559, 73 L. Ed. 505, 49 S. Ct. 17."

So far as we can find, this Court has never sustained service of process upon a foreign corporation which had never qualified to do business in the state, and which was not engaged in doing any business in the state at the time of the attempted service.

This is also the established law in Alabama. In **Cowikee Mills v. Ga. Ala. Power Co.**, 216 Ala. 221, 113 So. 4, the Court construed a statute which has been amended and is now known as Code of Alabama 1940, Title 7, Sec. 192 (Appendix D hereto), which immediately precedes, and is a companion statute to, Section 193, under which the purported service of process was had in this case. Said Section 192 provided for service of process upon a foreign corporation which had qualified to do business in the state and had then withdrawn from the state on a cause of action

which arose in the state while it was so qualified. The Alabama Supreme Court held that service upon the Secretary of State was not effective as to a foreign corporation which had ceased to do business in Alabama, and that such attempted service was a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The Court said:

> "* * *, we are of the opinion the language must be held applicable only to those foreign corporations still engaged in business in this state, and subject to the jurisdiction of our courts * * *."

In Ford Motor Company v. Hall Auto Co., 226 Ala. 385, 147 So. 603, the Alabama Supreme Court, in reversing the case, said:

> "(6) It will be observed that the validity of service upon an agent of a foreign corporation within the state depends upon whether the corporation was (1) doing business by an agent in the exercise of its corporate functions; (2) at the time suit was perfected by the service made, and (3) it is not to be tested by the time the process issued or was delivered by the sheriff, but at the time he served that process the corporation was doing business, an essential to service of process in the case. Jefferson Island Salt Co. v. E. J. Longyear Co., 210 Ala. 352 (3), 98 So. 119; Abraham Bros. v. Southern Ry. Co., 149 Ala. 547, 42 So. 837; Sullivan v. Sullivan Timber Co., supra; St. Mary's Oil Engine Co. v. Jackson Ice & Fuel Co., 224 Ala. 152, 157, 138 So. 834; General Motors Acceptance Corporation v. Home Loan & Finance Co., 218 Ala. 681, 120 So. 165; Friedlander Bros., Inc., v. Deal, 218 Ala. 245, 249, 118 So. 508; Cannon Manufacturing Co. v. Cudahy Packing Co., 267 U. S. 333, 45 S. Ct. 250, 69 L. Ed. 634, 641; Peoples Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 S. Ct. 233, 62 L. Ed. 587; Whitney Central National Bank, 261 U. S. 171, 43 S. Ct. 311, 67 L. Ed. 594. The

authorities on subsidiary systems are collected in the note, 67 L. Ed. 596, of the United States Supreme Court Reports."

This same proposition has also been held by the Alabama Supreme Court in the cases of **Harrub et al. v. Hy-Trous Corp.**, 249 Ala. 414, 31 So. 2d 567, and **Ex Parte Union Planters Nat. Bank & Trust Co. of Memphis, Tenn.**, 249 Ala. 461, 31 So. 2d 596.

We respectfully submit, therefore, that the decision of the Court below is contrary to the applicable decisions of this Court, and is also in conflict with the applicable local decisions of the Alabama Supreme Court.

The cases of **International Harvester v. Kentucky**, 234 U. S. 579; **International Shoe Co. v. Washington**, 326 U. S. 310, and the other cases cited by the Court of Appeals, involved situations where the corporation was actually transacting some kind of business in the State at the time of the purported service of process, and did not involve cases where the corporation **was not doing any kind of business at the time of the purported service of process.** For this reason they are not in point. This Court distinguished the International Harvester Co. case on this point in **People's Tobacco Company v. American Tobacco Co.**, 246 U. S. 79.

This is an important question of Federal law, which should be settled by the decision of this Court.

POINT B.

The only service of process in this cause was upon the Secretary of State under Code of Alabama 1940, Title 7, Sec. 193 (Appendix A). By its very terms, this statute only applies to corporations which have carried on or transacted business in the state without qualifying to do business within the state as provided by the statutes of the

state of Alabama. A corporation which is engaged solely in interstate commerce does not have to qualify to do business within the state. **Simonetti Bros. Produce Co. v. Peter Fox Brewirg Co.**, 240 Ala. 91, 197 So. 38.

At the time the cause of action arose, petitioner was engaged in refrigerating a freight car to be shipped in interstate commerce, and was therefore engaged entirely in interstate commerce and did not have to qualify to do business in Alabama. See:

Sou. Ry. Co. v. Peters, 194 Ala. 94, 69 So. 611;
A. C. L. Ry. Co. v. Jones, 9 Ala. App. 499, 63 So. 693;
J. F. Fitzgerald Constr. Co. v. Pederson, 324 U. S. 720-726;
Aldread v. No. Pac. Ry. Co., 160 Pac. 429.

It is clear, therefore, that the above statute has no application to petitioner.

We respectfully submit that the holding of the Court of Appeals that there was no merit in the contention that petitioner was engaged solely in interstate commerce is contrary to the applicable local decisions of the Alabama Supreme Court.

POINT C.

The issues made by the complaint and answer and the third party complaint should have been tried together and only one final judgment entered on all issues involved.

The opinion of the Court of Appeals is contrary to the holding of this Court in the case of Reaves v. Beardall, 316 U. S. 283. The issues made by the complaint and answer and the third-party complaint arose out of the same occurrences or transactions and did not involve claims that were entirely distinct. A trial of both sets of issues would involve substantially the same set of facts and sub-

stantially the same witnesses. Under Rule 42 b, the issues should have been tried together, and under Rule 54 b, only one final judgment should have been entered after both issues had been adjudicated.

The decision of the Court below is in conflict with decisions of the Court of Appeals of the Second, Third, Fourth, Sixth and Eighth Circuits. Those decisions are:

U. S. v. Braunstein, 168 F. 2d 749 (C. A. 2, 1948);
Audi Vision, Inc., et al. v. R. C. A. Mfg. Co., Inc., 136 F. 2d 621 (C. A. 2, 1943);
Coffman v. Federal Laboratories, Inc., 171 F. 2d 94 (C. A. 3, 1948);
Western Contracting Corp. et al. v. National Surety Corp., 163 F. 2d 456 (C. A. 4, 1947);
Kuly et al. v. White Motor Co., 174 F. 2d 742 (C. A. 6, 1949);
Parmalee v. Chicago Eye Shield Co., 157 F. 2d 582 (C. A. 8, 1946).

The Court below held that it was a matter of discretion on the part of the trial judge as to whether or not he would try the issues together and as to whether or not he would order a separate final judgment, regardless of the fact that the issues made by the complaint and answer and the third-party complaint involved the same occurrences or transactions and were not entirely distinct. The above cases hold that it is not a matter of discretion, but that it is a question as to whether or not the different claims meet the test of severability or joinder as laid down by this Court.

In **Coffman v. Federal Laboratories,** supra, the Court said:

> "Rule 54 (b) provides for a final judgment upon one claim in a suit predicated upon two or more claims. It is clear, however, that there must be differing occur-

rences or transactions which form the bases of separate units of judicial action before such a judgment can be entered under that Rule. They are not found here."

In the case of **Audi Vision, Inc., et al. v. R. C. A. Mfg. Co.**, supra, the Court said:

"(6) Rule 54 (b) has recently been authoritatively interpreted in Reeves v. Beardall, 316 U. S. 283, 285, 62 S. Ct. 1085, 1087, 86 L. Ed. 1478, where the Court has adopted and enforced the test that it is 'differing occurrences or transactions, which form the basis of separate units of judicial action.' "

In the case of **Parmalee v. Chicago Eye Shield Co.**, supra, in construing rule 54 (b), the Court said:

"* * * Confessedly, if any of the counterclaims second, third, fourth, fifth and sixth, arise out of the transaction or occurrence which is the subject matter of plaintiff's claim judgment should not have been entered under this rule."

We respectfully submit that the decision below is in conflict with the decisions of this Court and of other courts of appeal, and for this reason should be reviewed.

Petitioner was an invitee on the right of way of the Frisco Railroad, and the railroad owed petitioner a duty to keep said right of way in a reasonably safe condition. 52 C. J., p. 566; **Bennett v. L. & N. Ry. Co.**, 102 U. S. 577, Note 57, A. L. R. 819; 3 Elliott on Railroads, p. 821 et seq. Petitioner is entitled to indemnity or contribution against the Frisco Railroad if injury to Macks was caused by a breach of duty owed by the Frisco Railroad to petitioner.

Ala. Power Co. v. Curry, 228 Ala. 444, 153 So. 634;
Wheeler v. Glazer (Tex.), 153 S. W. 2d 440, 140 A. L. R. 1001;

Mallory S. S. v. Druhan, 17 Ala. App. 365, 84 So. 874; **Cent. Ins. Co. v. Miss Export**, 81 F. 2d 125.

Both sets of issues should clearly have been tried together, particularly since Macks claims both negligence and wilful or wanton conduct.

POINT D.

The Circuit Court of Jefferson County, Alabama, did not have venue of the action.

The undisputed facts disclosed by the record were that petitioner had never been engaged in doing any kind of business in Jefferson County, Alabama, and had never qualified to do business in the State of Alabama. The cause of action arose in Escambia County, Alabama.

The local venue statutes in Alabama have no application and the suit should be brought in a county where service of process might be had. In **St. Mary's Oil Engine Co. v. Jackson Ice & Fuel Co.**, 224 Ala. 152, 138 So. 834, the Court said:

> "(11) The statutes prescribing the venue of personal actions (sections 10467, 10471, Code 1923) are not applicable to nonresident individuals or nonresident corporations which have not qualified to do business in this state, and therefore the defendant was suable in any county in the state where service of process might be made. New York, Lake Erie & Western R. Co. v. Estill, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292; In re Hohorst, 150 U. S. 653, 14 S. Ct. 221, 37 L. Ed. 1211; 27 R. C. L., p. 803, Sec. 23. The defendant's plea in abatement was therefore overruled without error."

See also 56 Am. Juris., Sec. 32, p. 35.

The case of **Jefferson County Savings Bank v. Carland**, 195 Ala. 279, 71 So. 126, involved a cause of action which arose in the county where the suit was filed, and is therefore distinguished from the case at bar.

CONCLUSION.

For the reasons set forth, we respectfully submit that this Court should issue its Writ of Certiorari, as prayed in the Petition, to the end that the judgment of the court below may be reviewed and that said judgment may be reversed.

Respectfully submitted,

F. W. DAVIES,
Counsel for Petitioner.

APPENDIX A.

Code of Alabama 1940, Title 7, Section 193, 1947 Supplement.

Service of process on corporation not qualified to do business in the state.—Wherever a foreign corporation has carried on or transacted business in this state without qualifying to do business herein as is provided by the constitution and statutes of this state and there is no other agent and process, pleadings or papers cannot be served on such foreign corporation as is provided in the preceding section, then any legal process, pleadings or papers, other than in equity, concerning causes of action arising out of or as consequences of acts or business done in this state, may be served upon any agent or servant of such foreign corporation who has made contracts for the corporation or did the act which constituted the doing of business in this state; in the event process, pleadings or papers, cannot be served on either of the above named, then such corporation shall by a duly executed instrument filed in the office of the secretary of state, constitute and appoint the secretary of state its true and lawful attorney, upon whom all such process, pleadings or papers which may be served, and therein shall agree that all such process, pleadings or papers which may be served upon its said attorney, shall be of the same force and validity as if served upon the said corporation, and the authority thereof shall continue in force irrevocably until the statutes of limitations shall have run against the bringing of the action against said corporation, and the same shall be held as due and sufficient service upon such corporation. In the event such corporation shall fail to so constitute and appoint the secretary of state its true and lawful attorney, upon whom all such process, pleadings or papers may be served, and no other such agent shall have been so designated by such

corporation for such purpose, then such corporation shall be deemed to have consented to the secretary of state being its true and lawful attorney, upon whom all such process, pleadings or papers may be served, until the statutes of limitations shall have run against the bringing of the action against said corporation. The secretary of state must immediately transmit by registered mail, return receipt requested, to such foreign corporation at its home office, a copy of such process, pleadings or papers served upon him, retaining the copy of such process, pleadings or papers served upon him along with the return receipt as part of the permanent records of his office. This section, however, shall not be exclusive of any other mode of service of process, pleadings or papers in the cases herein provided for.

APPENDIX B.

Title 28, United States Code, Section 1254.

Sec. 1254. **Courts of Appeals; certiorari; appeal; certified questions.**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX C.

Title 28 United States Code, Section 1441 (a) and Section 1332.

Sec. 1441. **Actions removable generally.**

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Sec. 1332. **Diversity of citizenship; amount in controversy.**

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States;

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States," as used in this section, includes the Territories and the District of Columbia.

APPENDIX D.

Code of Alabama 1940, Title 7, Section 192, 1947 Supplement.

Sec. 192. Service on designated agent of foreign corporations; proof of agency—When a foreign corporation has filed an instrument in writing designating one or more agents in this state as provided by this code, process, pleadings or papers issuing against such foreign corporation, other than in equity, may be served upon any agent, so designated and the certificate of the secretary of state or of the auditor, as the case may be, showing such designation, is evidence of the fact of such agency. In the event such foreign corporation withdraws from this state and ceases to transact business herein, it shall continue to keep and maintain such agent within this state upon whom service of process, pleadings or papers may be made, until the statutes of limitations shall have run against the bringing of action against such corporation. If the agent designated by such foreign corporation shall die, resign, remove from the state, or his authority shall cease from any cause, and no other agent shall be designated by such foreign corporation, or said corporation shall revoke or fail to maintain in effect the authority of its designated agent after its withdrawal from this state and prior to the time when the statutes of limitations would have run against the causes of action so accruing against it, then in that event such corporation shall, by a duly executed instrument filed in the office of the secretary of state, constitute and appoint the secretary of state its true and lawful attorney, upon whom all such process, pleadings or papers may be served, and therein shall agree that all such process, pleadings or papers which may be served upon its said attorney, shall be of the same force and validity as if served upon the said corporation, and the authority thereof shall continue in force irrevocably until the stat-

utes of limitations shall have run against the bringing of the action against said corporation, and the same shall be held as due and sufficient service upon such corporation. In the event such corporation shall fail to so constitute and appoint the secretary of state its true and lawful attorney, upon whom all such process, pleadings or papers may be served, and no other such agent shall have been so designated by such corporation for such purpose, then such corporation shall be deemed to have consented to the secretary of state being its true and lawful attorney, upon whom all such process, pleadings or papers may be served, until the statutes of limitations shall have run against the bringing of the action against said corporation, and the same shall be held as due and sufficient service upon such corporation. The secretary of state must immediately transmit by registered mail, return receipt requested, to such foreign corporation at its home office, a copy of such process, pleadings or papers served upon him, retaining the copy of such process, pleadings or papers served upon him along with the return receipt as part of the permanent records of the office.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No.....

SHIPPERS PRE-COOLING SERVICE,
Petitioner,

v.

OFFIE L. MACKS

A PRELIMINARY STATEMENT CONCERNING THE MATTER INVOLVED

Because a misconception may be gained from petitioner's brief with respect to certain salient aspects of this litigation, we are constrained, albeit as succinctly as possible, to make the following observations.

Under "Argument" (Op. B. p. 18) counsel says:

> "At the time the cause of action arose, petitioner was engaged in refrigerating a freight car to be shipped in interstate commerce and *was therefore engaged entirely in interstate commerce and did not have to qualify to do business in Alabama.*" (Emphasis supplied).

And again under "Questions Presented" and speaking with respect to the validity, *vel non* of the service of process, counsel predicates the query upon the premise that peti-

tioner's activities in Alabama were solely in interstate commerce. We quote (Op. B. p. 5).

> "Is service of process under the provisions of Code of Alabama, 1940, Title 7, Section 193, 1948 Supp., valid when said corporation *was not engaged in doing intrastate business but was only engaged in interstate business at the time the cause of action arose.*" (Emphasis supplied).

And again and also under "Questions Presented" (Op. B. p. 5 para. 3) counsel refers to the case at bar as being "a suit based upon a cause of action which arose in a state while the corporation *was engaged in interstate commerce.*" (Emphasis supplied).

And under its "Specification of Errors" (Op. B. p. 11) the judgment of the court below is challenged (para. 2) for validating service of process upon the petitioner who it is asserted was "engaged *solely in interstate* commerce."

The record fails utterly to justify any such conclusion. On the contrary, it demonstrates beyond doubt that the activities of petitioner in Alabama were essentially intrastate in character.

The petitioner was a Texas corporation. Its business, as its name would imply, was selling a service involving the pre-cooling of freight cars loaded with potatoes and perhaps other produce. This corporation had been in Alabama (R. 30) a month at the time of the accident. It had brought five or six of its trucks similar to the one involved in this case (R. 208), consisting of a truck chassis and a cooling apparatus with condenser, etc., weighing approximately nine tons and eleven feet in height. The crews of these trucks (R. 208) at the time of the accident, had headquarters at Atmore, Alabama (R. 209) where arrangements had been made for their equipment to be garaged and serviced at a local establishment (R. 209). They had a manager with

them. His name was Galloway. He sought, and in behalf of the petitioner obtained, contracts from the potato growers and shippers thrdoughout the potato belt, including Atmore, Alabama (R. 208), Canoe, Alabama (R. 209) and Foley, Alabama (R. 30). Interrogatories were addressed to the petitioner, who made answers as follows: (R. 31):

"Q. State if it is not a fact that they solicited contracts among the potato farmers or produce farmers or among the shippers of potatoes and produce in and about Atmore and that general locality, said contracts being to pre-cool cars loaded or to be loaded with potatoes and other produce.
A. Yes.

Q. Whom did they make these contracts with?
A. H. Ward & Son, C. S. Jones, W. M. Patterson, L. Irwin & Son.

Q. Did they in fact perform any such contracts?
A. Yes."

Moreover, the record shows that these same activities were carried on in Alabama by the petitioner throughout the next ensuing potato season from May 3, 1948 to June 10, 1948. (R. 36).

The repeated statements of counsel that petitioner was engaged only in interstate commerce are simply not true. On the contrary (though the trial court did not regard it of any controlling moment), the petitioner was engaged entirely in intrastate commerce. It came into Alabama during the potato season. It came with much equipment and many men. It sought contracts locally, not from across state lines. It entered into contracts locally, not from across state lines. It performed contracts locally, not from across state lines. And presumably, these contracts which it sought, entered into and performed all within Alabama were precisely within the petitioner's corporate functions. We therefore

say that the petitioner was most certainly engaged in intrastate commerce and so engaged within the very strictest definition of that term.

We say additionally that petitioner, having failed to qualify in Alabama and pay her stipulated fees and taxes, and appoint a statutory agent, etc. (R. 28 and 29) had violated her laws, including her criminal statutes.

THE ARGUMENT

I. JURISDICTION

For a proper understanding of this case, the statutory background against which it arose must be clearly kept in mind.

At the time of this suit's commencement on April 15, 1948 in the Circuit Court of Jefferson County, Alabama, whence it was removed to the District Court of the United States for the Northern District of Alabama, there was in force in that jurisdiction a statute providing for service of process upon a corporation not qualified to do business there. Approved on July 6, 1940 that statute appears as Section 193 of Title 7 of the 1940 Code of Alabama. (It is set out as Appendix A on Page 23 of Brief of Petitioner).

This statute ordains, as its catch line indicates, for the service of process on corporations "Not qualified to do business in the state." It goes on to say that where a foreign corporation has carried on or transacted business in the state without qualifying as provided by Alabama's Constitution and statutes and there is thus no agent upon whom process can be served, then as to causes of action arising out of or as a consequence of business done in the state, process may be served on any agent making the contracts or doing the act constituting the doing of business. The statute concludes that if process cannot be served on such agent, then such corporation shall appoint the Secretary of

State to receive the process and failing to do so "then such corporation shall be deemed to have consented" to such service on that public official.

The scope and extent of petitioner's activities within Alabama's borders have been described. While the petitioner was so engaged the respondent was seriously injured at Atmore, Escambia County, Alabama. Section 193 was then in force. No local agent for service of process having been designated by the petitioner as sanctioned by that statute, and the Secretary of State not having been appointed as there permitted, the respondent pursued the remedy authorized in that contingency. He directed service of process to be had, as was done, upon the Secretary of State. To such service, as the statute provided, the petitioner was "deemed to have consented."

Macks, the respondent, having been hurt in Alabama by the petitioner while it was engaged in there doing business" may there seek redress for his injuries. No constitutional ban State or Federal forbids it. And this is so even though petitioner's activities in Alabama were, as counsel would have us believe, limited solely to interstate commerce.

International Harvester Co. v. Kentucky, 234 U. S. 579.
International Shoe Co. v. Washington, 326 U. S. 310.
United States v. Scophony Corporation, 333 U. S. 795,

As above observed by Mr. Justice Rutledge (*Scophony case, supra*) the time is now past when a foreign corporation may "come into a district, perpetrate there the injuries outlawed and then by retreating * * * to its headquarters defeat or delay the retribution due."

So ruled both courts below.

A *fortiori* that result must obtain where such foreign corporation is engaged in purely local affairs within Alabama wherein it has unlawfully intruded in violation of her penal statutes (§ 192 *et seq.* Tit. 10, Code of Alabama, 1940).

The several federal authorities cited by counsel in supposed opposition to these elementary assertions (*Consolidated Textile Corp. v. Gregory,* 289 U. S. 85; *Riverside, etc., Mills v. Menefee,* 237 U. S. 189; *Street, etc., Pub. v Spikes,* 120 F (2d) 895 (Cir. 5th) and the others neither deny our case nor invite our criticism. For in each instance, in these several cases, where service was quashed and jurisdiction held non existent the particular corporation "was not present"—it was not found there—it had not been engaged in business in the State or District and the excerpts quoted in counsel's brief must be read in that light.

The *Spikes case, supra,* decided by the Fifth Circuit and mainly relied on by counsel in the court below, is typical.

Spikes, a Texan, sued a New York publishing corporation in Texas. The corporation had never been in Texas. It was not qualified there. Its publications were distributed in the state through dealers who purchased its magazines in interstate commerce. It had no office there. It had no officer or other agent in Texas and never had had. It was, of course, elementary that a judgment *in personam* against Street & Smith Publications would not be sanctioned under these circumstances.

In the case at bar on the other hand, the Shippers Pre-Cooling Service, as we have said, did a large business in Alabama with agents there present performing contracts there made. Out of that business this case arose.

The other cases cited by the appellant are similarily distinguishable. Without attempting to discuss them in detail, *Consolidated Textile Corporation v. Gregory,* 289 U. S. 85 involved these facts. A New York corporation sold some of its bonds to a Milwaukeean named Gold. Nine years later the bonds defaulted. Gold would not join the bondholders protective committee and sued to enforce payment in New York. The president of the company, by pre-arrangement, went by train to Milwaukee to discuss the situation with

Gold. The corporation had no office in that state, no agents there; was not qualified to do business there. While the president was in Gold's office, Gold had the papers served in an action to enforce the corporation's obligations in the Wisconsin courts. This Court said no.

Riverside & Dan River Cotton Mills, Inc. v. Wilson Menefee, 237 U. S. 189, is to like effect. A citizen of North Carolina sued a Virginia corporation for an accident happening in Virginia. He brought the suit in North Carolina. A director of the company lived in that state, but other than that the defendant had no relationship with that jurisdiction. It did no business there. It had no agents there. This court held the action could not be maintained.

The other cases cited may, for similar reasons, be summarily dismissed from present consideration. Only one of them, a state decision, requires further special comment.

We quote from the opposing brief. (Op. B. p. 15):

> "In *Cowikee Mills v. Ga.-Ala. Power Co.,* 216 Ala. 113 So. 4, the court construed a statute which has been amended and is now known as Code of Alabama 1940, Title 7, Sec. 192 (Appendix D, petitioner's brief) which immediately precedes, and is a companion statute to, Section 193, under which the purported service of process was had in this case. Said Section 192 provided for service of process upon a foreign corporation which had qualified to do business in the state and had then withdrawn from the state on a cause of action which arose in the state while it was so qualified. The Alabama Supreme Court held that service upon the Secretary was not effective as to a foreign corporation which had ceased to do business in Alabama and that such attempted service was a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States."

And then counsel proceeds to quote from the *Cowikee Mills* case as follows:

"* * *, we are of the opinion the language must be held applicable only to those foreign corporations still engaged in business in this state and subject to the jurisdiction of our courts * * *."

The *Cowikee Mills case* was decided in 1927. Service was attempted under Section 9426 of the Code of 1923—a wholly different picture. The statement of counsel that § 192, as it now appears (and inferentially § 193) of Title 7 of the Code of 1940 was there construed is simply not true.

These latter statutes were then not in existence. All that part of § 193 of Title 7 under which service was accomplished in this case did not come in being until 1940.

Moreover, in the *Cowikee Mills case* the non resident corporation had complied with Alabama's statutes requiring it to qualify there. But its activities in Alabama had come to an end. It had no agent there. It did no business there. And it had filed with the state authorities its formal withdrawal. Quoting from the opinion:

"Some considerable time prior to the commencement of this suit, defendant had disposed of all of its holdings here located, had ceased to do any business in the state by agent or otherwise and had in March, 1926 *formally filed in the office of the Secretary of State its declaration of withdrawal from and discontinuance of operations in this state.*" (Emphasis supplied).

This suit was begun in 1948. The statutory background (counsel to the contrary notwithstanding) was vastly different. Neither could this suit have been maintained had it, like Cowikee Mills, been commenced in 1927.

Counsel seeks to fortify his argument in this respect by saying that petitioner was engaged in interstate commerce; that being engaged in interstate commerce it was not obliged to comply with Section 192, *et seq.* of Title 10 of the 1940 Code of Alabama requiring a foreign corporation

doing business in Alabama to qualify under her laws, pay certain fees, appoint a statutory agent, etc., and that not being required, because of such interstate commerce to comply with said Section 192 of Title 10, Section 193 of Title 7 can have no application and that the service of process attempted and had in this case thereunder was ineffectual.

Section 192 *et seq.* of Title 10 not requiring petitioner to qualify because its activities were confined to interstate commerce, counsel argues Section 193 of Title 7, under which service was accomplished, does not apply. This we respectfully submit is a complete and utter *non sequiter.* Section 192, *et seq.* of Title 10 of the 1940 Code of Alabama excuses a foreign corporation from qualifying in Alabama if they are doing only an interstate business within her boundaries. With that we agree. The statute plainly says so.

But even if petitioner had been doing only interstate business in the state it could, *if it had so elected, qualify as a foreign corporation,* and as we read Section 193 of Title 7, if it failed to qualify, whether the business be interstate or intrastate, it could be sued in Alabama for its torts there committed by serving the Secretary of State.

The reach of the two statutes is not coextensive. True the petitioner, if engaged solely in interstate commerce would not have to qualify under § 192 *et seq.* of Title 10. But if it does not qualify, whether its activities be interstate or intrastate § 193 of Title 7 applies.[1]

Nor, we submit, may petitioner derive any comfort from the fact that service of process on it was accomplished by serving the Secretary of State on April 20, 1948 (R. 327) at an instant, between potato seasons, when petitioner had neither personnel nor materiel within the state.

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[1]For the reasons pointed out however the activities of petitioner being intrastate § 192 et seq. of Title 10 did apply, and petitioner having failed to qualify violated these penal statutes.

The Secretary of State was there. And that official, under authority of § 193 was deemed to be the agent to receive service of the process.

If by flight out of the state, (or lack of presence therein), a non resident defendant could defeat jurisdiction obtained through serving a state official under an appropriate statute, we will have to change our thinking in many quarters—the non resident motorist statutes, universally adopted throughout our country, for example.

The answer is, whether its activities be interstate or intrastate, there is no valid constitutional impediment to jurisdiction of the petitioner in this case, just as there is no valid constitutional objection to the manner of service of process by which such jurisdiction was obtained.

II. THE VENUE

The next proposition urged by the petitioner is that the suit was improperly filed in the Circuit Court of Jefferson County, Alabama, and that as a necessary corollary the venue was improper in the United States District Court for the Northern District of Alabama rather than in the United States District Court for the Southern District of Alabama, which embraces the County of Escambia, Alabama, where the accident happened.

It is respectfully submitted there is no validity in any such contention.

It will be remembered that the appellant is a Texas corporation that never bothered to qualify in Alabama. It is a non-resident in the strictest sense of the word, as it has not designated, except by its implied consent, a statutory agent upon whom service of process could be had. It has no greater rights with respect to venue than an individual passing through the state in an automobile. Indeed, it has

less, as, in our view, by failing to qualify, it has violated the penal laws of Alabama.

The question was squarely passed upon in *Jefferson County Savings Bank v. Carland, et al.*, 195 Ala. 279, 71 So. 126. In that case the bank sued the defendants in Jefferson County on a contract there made. The defendants were non-residents, living in Ohio. They were served with process in Cullman County. They plead in abatement that the only place where they could be sued was where they were found, namely, Cullman County. The trial court sustained their plea. On appeal the case was reversed, it being declared by Mr. Justice Sayre of the Supreme Court of Alabama as follows:

"The privilege, which a resident of this state has, of being sued in the county of his permanent residence, is personal to him—*Weaver v. Crenshaw*, 6 Ala. 872. It is conferred by our statute of venue, without which the place of trial would be optional with the plaintiff. But the statute makes no provision as to venue in transitory actions against non-residents. By coming here, however, transiently, defendants have submitted themselves to the jurisdiction which every state exercises over all persons within its limits in respect to matters purely personal, which, in contemplation of law, have no locality; and we apprehend there is no good reason why they should have the benefit of a personal privilege of mere convenience which the statute has conferred only upon persons having a permanent residence in this state. Every substantial right they have may, and will beyond peradventure, be as fairly adjudicated, and for aught we can see, as conveniently in Jefferson County as anywhere else in the state due process and equal protection, which, respectively, are satisfied by any practice having the sanction of common-law usages, and have reference to substance and not form, do not require that the privilege of localizing actions should be conferred alike on resident and non-resident defendants, though in some states it has been done. *N. Y. etc. R. R. Co. v. Estill*, 147 U. S. 591, 608,

13 Sup. Ct. 444, 37 L. ed. 292. The plea was insufficient." (Page 282).

The discussion of Judge Sayre in the opinion in this case is interesting and is pertinent to one or two of the remarks made by the Supreme Court in the *St. Mary's Oil Engine Company v. Jackson Ice and Fuel Company,* 224 Ala. 152, and *Harrab v. Hy-Trous Corporation,* 249 Ala. 449, both cited and relied on by counsel for petitioner. For instance, in the *St. Mary's Oil Engine case,* one of the statements there made is as follows:

> "The statutes prescribing the venue of personal actions (Sections 10467, 10471, Code 1923) are not applicable to non-resident individuals or non-resident corporations which have not qualified to do business in this State, *and therefore the defendant was suable in any county in the state where service of process might be made.*"

As was observed by Judge Sayre in the Carland case, that final remark is subject to the explanation which he made of *Steen v. Swadley,* 126 Ala. 617, mentioned and discussed in the opinion and whose language he quotes as follows:

> "When as in this case a cause of action is transitory in its nature, it may be sued on wherever within the state the defendant may be personally served with process, though he be a non-resident."

Judge Sayre declared that remark to have been well said because in that case and in the latter case of *Lee v. Baird,* 139 Ala. 526 (and by the same token as in the *St. Mary's Oil Engine* and *Harrab* cases) the venue of the suit was actually laid in the county where service of process on the non-resident defendant was effected. But as Judge Sayre points out, the true rule in respect to service of process on a non-resident defendant is that he, or it, where a non-qualifying cor-

poration, may be served anywhere within the territorial jurisdiction of the sovereignty. The process of the Circuit Court of Jefferson County, Alabama, runs through the state.

It is respectfully submitted that both as to jurisdiction and as to venue the case at bar was properly tried by the District Court for the Northern District of Alabama.

III. THE THIRD PARTY COMPLAINT

Petitioner's last contention (Point C) is that "the issues made by the complaint and answer and the third party complaint should have been tried together and only one final judgment entered on all issues involved." (Op. B. p. 18).

There are several reasons why any such notion, in this case, is wholly fallacious.

In the first place, Macks, the respondent, was an employee of the St. Louis & San Francisco Railroad Company (the third party defendant). His run was from Pensacola, Florida, into Alabama, and return. He was thus engaged in interstate commerce. If he asserted any claim against his employer, it would necessarily have been under the Federal Employers Laibility Act (45 USCA, Section 51, *et seq.*).

Macks' claim against the petitioner, on the other hand, was under the common law.

Had the court ordered a common trial of the issues presented in the main case and those tendered in the third party complaint, Macks, as was authorized under Rule 14 of the Rules of Civil Procedure, would certainly have seized the opportunity to assert a claim against the third party defendant. Why not? He would have had a free ride and he would have had two strings to his bow.

What would have been the situation then presented?

Macks' claim against the railroad would have been based upon the alleged negligence of that carrier as defined by the Federal Employers Liability Act. Contributory negligence is no defense to such an action. But the third party defendant railroad would be entitled to offset demages by any such contributory negligence it could show on the part of the plaintiff and have the damages prorated *cf. Pierce v. Pennsylvania Railroad Company,* 162 F (2) 524 (Third Circuit).

The Federal Employers Liability Act is not concerned with wanton conduct.

On the other hand, the gist of Macks' claim against the Shippers Pre-Cooling Service was not only negligence, but in the third count of his complaint it was wanton conduct. As to the negligence charged in the first two counts of the complaint, the contributory negligence of the plaintiff is an absolute defense, irrespective of however slight such contributory negligence may have been. Whereas, as to the wanton count, contributory negligence is no defense at all.

Moreover, the evidence with respect to the damages in the two different causes of action and the methods of proving them are wholly dissimilar.

In a suit under the Federal Employers Liability Act we would have been entitled to show, had the circumstances justified it, the life expectancy of Macks on the day of his trial and the diminution of earnings which he might have suffered throughout that period because of his injuries, with the further right to show to the jury the present value of a sum which, if prudently invested at current rates, would make him whole as against such loss in compensation.

No such evidence would have been admissible in Macks case against the Shippers Pre-Cooling Service.

The phrase of the court below: "All the incongruous issues" thus involved, is, if anything, an understatement.

Aside from Macks claim against his employer, the railroad, what is the situation here as created by the pleadings in the case?

There is first of all the claim of Macks against the petitioner. And then, *secondarily*, if the court please, there is the asserted right over by the petitioner against the railroad.

But that claim over against the railroad is entirely inchoate.

Suppose Macks had lost this case against the petitioner, the latter's claim against the railroad would never have been burgeoned into being.

Before the petitioner could ever have any semblance of a claim over as against the railroad, it, the petitioner, must first have been adjudged liable to Macks.

In the phrase of Judge Parker in *Western Contracting Corporation v. National Surety Company*, 163 F (2d) 456, (one of the cases cited by petitioner) the liability of the railroad to the petitioner was "merely secondary" to the liability of petitioner to Macks. There could be no liability on the part of the railroad separate from that of petitioner to Macks.

This indeed is conceded in the very language of the cross complaint itself, as follows. (R. 22):

> "Wherefore the defendant, Shippers Pre-Cooling Service, a body corporate, demands judgment againt the third party defendant, St. Louis & San Francisco Railway Company, a corporation, for all sums that *may be adjudged against this defendant*. Shippers Pre-Cooling Service, a body corporate, in favor of the plaintiff, Offie L. Macks."

All the trial court did in this case was merely "to put first things first." *Non constat,* Macks may never have had a verdict. Should that have been the trial's eventuation, that would have been an end to the litigation, including

the third party complaint, which thus would have been summarily disposed of.

Moreover, as thus weighed up, the claim of Macks against the petitioner is demonstrated to have been entirely "separate and distinct" from the latter's inchoate right against the railroad, counsel's *ipse dixit* (Op. B. p. 18) to the contrary notwithstanding. Such being true, the several authorities cited in petitioner's brief become inapt.

There is still another reason (if any be needed) why the District Court's Order for a separate trial and a separate judgment was right. By the substantive law of Alabama, it is extremely problematical whether petitioner ever could have a right of recovery over as against the railroad. See *Gobble v. Bradford,* 226 Ala. 517, 147 So. 619.[2]

All these factors, and perhaps others, were no doubt taken into account by the trial court when it ordered a separate trial and a final judgment. In any case both rulings, as the court below observed, "was discretionary with the trial court, and its action in this regard is not here subject to review no abuse of discretion being shown." (R. 337).

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[2]In the *Gobble case,* a Mrs. Carson, gratitous passenger in Bradford's automobile, was hurt when it collided with a truck of Gobble. She sued Bradford in one suit and Gobble in another. She recovered judgment of Bradford for $2,000.00 and of Gobble for $700.00. She naturally took the $2,000.00 and Bradford then sued Gobble for contribution. The Supreme Court of Alabama after observing that the question presented in the case *had never therefore been determined in Alabama* concluded that no contribution could be had by plaintiff against Gobble The court characterizes both Gobble and Bradford as joint tort feasors who were, as between themselves, wrongdoers within the meaning and influence of the general rule.

The contention was made in that case by Bradford that Gobble's negligence was the greater and that the conduct of Gobble was the primary cause of the injury and that therefore the general rule ought not to apply. The court said that degree of negligence was of no moment and would not change the rule.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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